No. 92-1911

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

PUD NO. 1 OF JEFFERSON COUNTY
AND THE CITY OF TACOMA,
Petitioners,
v.
STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES AND
DEPARTMENT OF WILDLIFE

On Writ of Certiorari to the Supreme Court of the State of Washington

REPLY BRIEF FOR THE PETITIONERS

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The State of Washington and its supporting amici appear to agree with Petitioners ("Tacoma") that this case presents issues of federal law concerning: the scope of the delegation of certification authority to the States in § 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341; the requirements applicable to the Elkhorn Project under CWA § 303 water quality standards, 33 U.S.C. § 1313; and whether Washington's statute requiring maintenance of base flows to preserve fish habitat (Washington Revised Code ("RCW") 90.54.020(3)(a) (1992)) is an "appropriate requirement of State law" under § 401(d)'s grant of authority to condition water quality certifications. Washington has abandoned its earlier claim (Wash. Br. in Opp. 14) that the decision below rests on an adequate and independent State ground. Washington and its amici have also repudiated a principal ground for the Washington Supreme Court's ruling that the phrase "any other appropriate requirement of State law" in § 401(d) refers not only to water quality standards but to "all state action

related to water quality" (Pet. App. 13a).[1] Wash. Br. 15 n.19; Am. Riv. Br. 10 n.4; U.S. Br. 17-18 n.7.

Tacoma does not question the State's authority under § 401 to assure that any properly defined and identified discharges from the Elkhorn Project into navigable waters comply with Washington's water quality standards under § 303, and with any other State law appropriate to the standards and limitations enumerated in § 401. The Washington Supreme Court, however, rejected Tacoma's argument that "water quality standards are limited to pollution and discharges, as opposed to stream flow levels" (Pet. App. 9a-10a). It sustained the streamflow conditions imposed in the certificate (Pet. App. 83a) not because specific discharges would have a polluting effect, but because the project itself will alter the flow of the Dosewallips River in the by-pass reach. The court erred. Congress limited State § 401 authority to prevention of polluting "discharges" from federally licensed activities. It never intended alterations of streamflows by diversions or impoundments to be treated as "pollution" *per se* under the CWA. Washington therefore lacked authority under § 401 to limit the quantities of water the Elkhorn Project could divert for hydroelectric purposes.

Washington has a forum for its interests, however. Under FPA § 10(j), 16 U.S.C. § 803(j), FERC must base its own fish habitat conditions on Washington's recommendations unless it finds that they are "inconsistent with the purposes and requirements of [FPA Part I] or other applicable law". Section 10(j) protects Washington's concerns and preserves Tacoma's ability to continue its pursuit of a license.[2] Section 401 of the CWA was intended to ensure that discharges from federally licensed projects comply with State water quality standards. Washington wrongly inflates such certification into a comprehensive scheme that supplants the federal licensing process.

[1] The repudiated ground is the holding (Pet. App. 11a-13a) that the enumeration of § 303 (water quality standards) in § 401(a), but the omission from § 401(d) of a reference to § 303, reflected Congressional intent not to limit State conditioning authority under § 401(d).

[2] If this Court holds the certificated streamflow conditions legally invalid, Tacoma would contest them before FERC. Tacoma has not conceded that the § 401 flows are necessary to protect fish habitat in the by-pass reach.

I. A CONCRETE QUESTION CONCERNING THE RELATIONSHIP OF THE FPA AND THE CWA IS PRESENTED

The United States' assertion that the relationship between Part I of the FPA and State authority under § 401 need not be considered in this case (U.S. Br. 22-29) is without merit. States have resorted to § 401 because they are otherwise preempted (*California v. FERC*, 495 U.S. 490 (1990)) from unilaterally imposing streamflow conditions on hydroelectric licenses under the FPA.[3] The United States' argument ignores the preclusive effects of Washington's § 401 conditions on Tacoma's ability to obtain a federal hydroelectric license. Those effects result from both economic[4] and legal considerations. It would be futile for Tacoma to continue the licensing process unless it can contest Washington's flow conditions before FERC. FERC's ability to determine whether, under FPA § 10(j), it should reject Washington's flow conditions depends on proper construction of § 401 of the CWA. Therefore, the relationship between State certification authority under the CWA and the requirements of the FPA presents an immediate and concrete issue that is ripe for decision. *Pacific Gas & Elec. Co. v. State Energy Resources Cons. & Dev. Comm'n*, 461 U.S. 190, 201-202 (1983).

[3] See *The Federal Energy Regulatory Commission's Hydropower Licensing Program: Hearing before the Environment, Energy and Natural Resources Subcommittee of the Committee on Government Operations*, 102nd Cong., 2d Sess. 5 (1992) (hereinafter "*1992 FERC Hearings*") (Statement of Gail Ann Greely).

[4] The challenged conditions render the Project economically infeasible (Tacoma Br. 12-13 n.7).

The United States offers no support whatsoever for its assertion that FERC might impose different conditions despite § 401(d)'s express requirement that any certification under § 401 "shall become a condition on any Federal license or permit subject to the provisions of this section." The United States also fails to discuss FERC's decisions holding that the Commission has no authority to reject or revise conditions in a State water quality certification, even when it concludes that such conditions are outside the scope of § 401.[5] The United States also overlooks FERC decisions refusing to conduct hearings on appropriate § 10(j) conditions where a State has "preempted" the § 10(j) process with its own conditions under CWA § 401(d).[6]

Comparing its argument to *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772-779 (1984), the United States asserts that *if* FERC were to adopt streamflow conditions inconsistent with Washington's § 401 certificate requirements, then any conflict could be tested on review of the FERC license under § 313(b), 16 U.S.C. § 825*l*(b) of the FPA (U.S. Br. 27-29). Since FERC's current position is that it will not reexamine such conditions, it is the United States' argument, not Tacoma's, that is hypothetical. Because the conditions in *Escondido* were imposed on the license under the requirements of FPA § 4(e), 16 U.S.C. § 797(e), the Court held that they were subject to review like

[5] *Town of Summersville*, 60 FERC ¶ 61,291 at 61,990 (1992); *Carex Hydro*, 52 FERC ¶ 61,216 at 61,770 (1990); *Central Maine Power Co.*, 52 FERC ¶ 61,033 at 61,172-61,173 (1990).

[6] *Puget Sound Power & Light Co.*, 64 FERC ¶ 61,045 at 61,372 (1993). In *Puget Sound*, the FERC denied Puget's motion for an evidentiary hearing on instream flow issues on the ground that it had no authority to establish minimum flows lower than those set forth in the State § 401 certification. Because that certification is being challenged by Puget Sound in State and federal courts, FERC later rescinded its denial of the request until those challenges are resolved. *Puget Sound Power & Light Co.*, 65 FERC ¶ 61,050 at 61,439 (1993). See also *OMYA, Inc.*, 62 FERC ¶ 62,224 at 63,417-63,418 (1993).

other license conditions under § 313(b). 466 U.S. 778 n.19. The scheme of the CWA is different. When a State denies, grants, or grants on conditions a § 401 certificate, it is proceeding under federal authority delegated in § 401 of the CWA. It has been uniformly held that jurisdiction to review State determinations under § 401 lies exclusively in the State courts.[7] Congress did not intend "that a challenge to certification or its denial be incorporated in a broader challenge to a federal permit." *Town of Sutton v. Water Supply and Pollution Control Comm'n*, 355 A.2d 867, 870 (N.H. 1976).

The United States also does not explain how, under preclusion and "full faith and credit" principles, Tacoma could relitigate the certification conditions before FERC or another court if the judgment below is affirmed.[8] Since § 511(c)(2), 33 U.S.C. § 1371(c)(2), of the CWA bars federal agencies from reviewing State § 401 certificates *sua*

[7] *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982); *United States Dep't of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992); *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991); *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1st Cir. 1989); *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1009 (3rd Cir. 1988); 40 C.F.R. § 124.55(e). A different case might be presented if a State has no procedure whatsoever for judicial review of a § 401 certificate. See *Summit Hydropower Partnership v. Comm'r of Envtl. Protection*, 629 A.2d 367 (Conn. 1993) (Connecticut courts lack jurisdiction to review denial of § 401 certificates).

[8] See *Lake Erie Alliance for Protection of Coastal Corridor v. U.S. Army Corps of Eng'rs*, 526 F. Supp. 1063, 1074 (W.D. Pa. 1981), cert. denied, 464 U.S. 915 (1983) (state court affirmance of § 401 certification *res judicata* in federal court review of federal permit); See also *United States v. Utah Constr. and Mining Co.*, 384 U.S. 394, 421-422 (1966) (*res judicata* applies to administrative determinations); *Blonder-Tongue Lab. Inc. v. University of Ill. Found.*, 402 U.S. 313, 327 (1971); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (collateral estoppel bars relitigation of resolved claim against another party). In addition, a court of appeals reviewing a final hydroelectric license would be bound to give full faith and credit to the judgment of the Washington Supreme Court sustaining the streamflow conditions in the § 401 certificate. 28 U.S.C. § 1738.

sponte even under the provisions of the National Environmental Policy Act, FERC's abandonment of its current policy of refusing to re-examine § 401 certificate conditions would seem to be not only unlikely, but questionable.[9]

II. DAMS AND DIVERSION STRUCTURES ARE NOT 'POLLUTION" *PER SE*

The contention of Washington (Wash. Br. 33) and American Rivers, *et al.* (Am. Riv. Br. 16) that a dam is a "discharge" under the CWA because its construction involves the discharge of dredged and fill material subject to a Corps of Engineers permit under § 404, 33 U.S.C. § 1344, amounts to an assertion that all dam and diversion structures are pollution *per se*. The Washington Supreme Court did not hold that discharge of such materials during the Elkhorn Project's construction justified the streamflow conditions imposed on the completed structure under § 401, nor did it decide the scope of the Corps of Engineers' permitting authority under § 404.[10] The proper

[9] Also without merit is the United States' suggestion (U.S. Br. 28 n.13) that the Elkhorn Project may ultimately be defeated by whatever policy the federal government finally adopts to reconcile protection of the northern spotted owl on the Olympic Peninsula with economic development in the State of Washington. Tacoma must satisfy numerous State and federal permitting requirements, including those under the Endangered Species Act, before it can be granted an acceptable hydroelectric license by FERC. In this case, Tacoma seeks only the right to continue pursuit of appropriate streamflow conditions. The § 401 conditions and the record in this case are not based on harm to the spotted owl. Moreover, the record does not contain any survey for spotted owls in the area of the Elkhorn Project. If Tacoma prevails here, the Project will be examined by FERC in light of the President's *Forest Management Plan* of July 1, 1993, which includes economics in the balance, and whatever regional Forest Plan finally emerges.

[10] The water quality certificate at issue contains specific construction activity conditions (Pet. App. 84a) which are not challenged in this proceeding. Tacoma has assured FERC that six months prior to construction it will apply for a § 404 permit for discharge of dredged and fill materials. R., PCHB Ex. A-4 Elkhorn Hydroelectric Project, Application for License 8 (1986).

scope of such authority and the effect of § 401 certificates on § 404 permits are not issues before this Court.

In any event, § 404 requires a permit for the discharge of dredged and fill material used during the *construction* of dams and diversion structures. *Monongahela Power Co. v. Marsh*, 809 F.2d 41 (D.C. Cir.), cert. denied, 484 U.S. 816 (1987).[11] Whether § 404 extends beyond such discharges during construction to the regulation of activities and impacts incidental to the resulting structure is being contested in other litigation.[12] For purposes of this case, the significant point is that in the CWA, Congress did not declare all dams and diversion structures to be "pollution" *per se*. On the contrary, Congress has treated such structures and their consequences in express but limited terms.[13] This selective treatment is in direct con-

[11] In *Monongahela Power* the court of appeals reversed a district court determination that no § 404 permit was required for the discharge of fill material into navigable waters during construction of a hydroelectric facility previously licensed by the Federal Power Commission. The court dealt only with the ruling that the FPC's licensing authority created an implied exemption from the Corps permitting authority under § 404. It did not reach any other procedural or substantive contention. 809 F.2d at 53 n.118.

[12] *Alameda Water and Sanitation Dist. v. Browner*, No. 91-M-2047 (D. Colo.) (EPA veto under § 404(c) of Corps of Engineers permit for municipal water supply project approved by State); *American Mining Congress v. U.S. Army Corps of Eng'rs*, No. 93-1754 (D.D.C.) (challenge to regulations for discharges of dredged and fill materials published at 58 Fed. Reg. 45,008 (August 25, 1993)).

[13] See *e.g.*, CWA §§ 102(b)(2) and (6), 33 U.S.C. §§ 1252(b)(2) and (6) (at federal reservoirs and at FPA-licensed projects, EPA to determine storage for regulation of streamflow for water quality purposes; storage for other streamflow purposes reserved to federal agency managing federal reservoir or FERC); § 304(f)(2)(F), 33 U.S.C. § 1314(f)(2)(F) (EPA to issue information on methods to control pollution resulting from dams and flow diversion facilities); §§ 404(f)(1) and (2) (discharges of dredged and fill material associated with repairs and maintenance on existing dams exempt from § 404 permit requirements, but such permits required for such discharges when "incidental" to activities that may impair the flow, circulation or reach of navigable

flict with Washington's attempt to sweep all such structures wholesale into the definition of "pollution" in CWA § 502(19), 33 U.S.C. § 1362(19).

Moreover, the assertion that a dam-in-place is a "discharge" (Wash. Br. 33) is wrong. First, it is contrary to the plain English meaning of the unqualified term "discharge" as it is used in § 401. Second, Washington seems to assume that once *any* discharge has been identified with an activity (such as a discharge of dredged and fill material during the process of construction), then the State can, under § 401(d), condition the activity itself rather than specific discharges from it. Section 401's plain terms, however, apply only to "such discharge" as results from the licensed activity,[14] not to the activity causing the discharge. Congress made this intent clear when it substituted § 401(a)'s express references to discharges for the 1970 provision's reference to "such activity" (Tacoma Br. 26-27).[15] Ultimately, Washington's argument rests on its contention that any alteration of streamflow that may affect fish habitat is "pollution" (Wash. Br. 29 n.36). "Pollution" for the purposes of the CWA refers to contaminants that reduce water quality, not non-contaminating

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waters); Water Quality Act of 1987, § 524, Pub. L. No. 100-4, 101 Stat. 89, 33 U.S.C. § 1375, note (EPA is required to report to Congress on water quality effects of impoundments).

[14] Washington's further argument that construction will cause discharges of pollutants (dredged spoils and concrete) and non-point source pollution (soil erosion) (Wash. Br. 35) is not relevant to the specification of streamflow quantities in the § 401 certificate. Such consequences were not cited as a ground for regulating streamflow in the § 401 certificate or the Washington Supreme Court's opinion.

[15] It appears that the former provision, CWA § 21(b), as added in 1970 by § 103, P.L. 91-224, 84 Stat. 108 (1970), was also limited to discharges. The limitation is indicated by the references to "discharge" in former §§ 21(b)(2) and (3). EPA's current § 401 regulations, adopted in 36 Fed. Reg. 22,487 (November 25, 1971), refer to certification of "activities". 40 C.F.R. § 121.2. They have not been revised to comply with the text of current § 401 and are therefore not an authoritative construction of that provision.

alterations of water quantity. Moreover, the term "pollution" is not used substantively in any of the sections enumerated in § 401 (See Tacoma Br. 40-41).

The United States does not appear to agree that dams themselves are discharges. It seeks the same result, however, by contending (U.S. Br. 12-14) that all "indirect" effects of a structure resulting from the deposit of dredged and fill material can be regulated under § 401. Like Washington, it converts § 401's certification of discharges into a super-license for the activity's operations. The alteration of streamflow by a dam or diversion structure is not a discharge, but a consequence of the stabilization or impoundment caused by the completed structure. Congress has expressly limited State certification under § 401 to "discharges" from activities authorized by a federal license or permit. Section 401 does not apply to discharges of dredged and fill material for the repair and maintenance of existing dams and dikes because they are exempt from the requirement for a § 404 permit. CWA § 404(f)(1)(B), 33 U.S.C. § 1344(f)(1)(B). As for new structures, under § 404(f)(2) Congress requires § 404 permits (and thus § 401 certifications) only for discharges "incidental to any activity having as its purpose" a new impairment of the flow or circulation, or reduction of the reach of navigable waters. On its face, § 404(f)(2) is limited to discharge of a particular kind of pollutant when incidental to the construction of a new dam.[16] The "indirect effects" argument of the United States turns the meaning of both §§ 401(a) and 404(f)(2) upside down, because the argument would authorize direct regulation of the activity incidental to a discharge, instead of regulation of a discharge incidental to the licensed (or permitted) activity.[17]

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[16] The distinction between State control of polluting discharges under § 401, and authority to review the general environmental effects of the discharge of dredged or fill material under § 404, is correctly recognized in *Commonwealth Dep't of Envtl. Resources v. City of Harrisburg*, 578 A.2d 563, 567 (Pa. Commw. 1990).

[17] The United States is also mistaken in its reliance on § 401(a)(3), which provides that a certificate for discharges associated

A similar misapprehension is reflected in American Rivers' contention (Am. Riv. Br. 3, 15) that changes in the flow of waters caused by dams and diversion facilities are "pollution" within the meaning of § 304(f)(2)(F). The plain language of § 304(f)(2)(F) directs EPA to issue information concerning methods for controlling pollution *resulting* from dams and diversion structures. It does not say that either the structures or changes they cause *are* pollution.

III. THE PRESCRIPTION OF STREAMFLOW QUANTITIES IN § 401 CERTIFICATES IS A PROHIBITED *DIRECT* REGULATION OF *QUANTITY*, NOT AN INCIDENTAL EFFECT OF REGULATING THE WATER *QUALITY* OF DISCHARGES FROM HYDROELECTRIC DIVERSION STRUCTURES

Respondents and amici extend CWA §§ 401 and 303 beyond the limits Congress intended by invoking them to directly regulate streamflow quantities, *i.e.*, the volume of water measured in cubic feet per second that must be left in the stream (Pet. App. 83a). In its opening brief (Tacoma Br. 37-42) Tacoma demonstrated that Congress did not intend that CWA §§ 401 and 303 be applied to regulate the diversion of water quantities. The fact that the State of Washington rather than the federal government is attempting under § 401 to regulate quantities does not, as Washington contends (Wash. Br. 18), bring the attempt within the scope of the CWA. The regulation of quantities does not depend on which government is acting, but on the law that is being applied. The law being applied here, as the Washington Supreme Court

with construction is also to apply to operations of the facility. The effect of § 401(a)(3) is to require that *operational* discharges —properly defined—be considered at the same time that discharges resulting from *construction* are considered. A certification issued prior to construction remains in effect under § 401(a)(1) unless, prior to operation, notice is given that such operation will no longer comply with the enumerated requirements in § 401 because of changes in the facilities, the receiving waters, applicable water quality criteria or applicable effluent limitations or other requirements.

recognized (Pet. App. 14a-15a), is *federal*: the Clean Water Act. The § 303 water quality standards invoked under § 401 are federally reviewed, controlled and supervised. Such standards must comply with EPA's requirements; if they do not, EPA itself becomes the default regulator prescribing and administering appropriate water quality standards. CWA § 303(c)(3). Similarly, if a State lacks authority to issue § 401 certifications, the EPA performs that function. Section 401(a)(1). The legislative history of § 303 (Tacoma Br. 36-37), and the express provisions in §§ 510(2), 33 U.S.C. § 1370(2), and 101(g), 33 U.S.C. § 1251(g) clearly demonstrate that Congress intended to confine the CWA to water quality, as opposed to water quantity, precisely because the federal role is pervasive and controlling. American Rivers' contention (Am. Riv. Br. 28) that protection of water quality need avoid interference with water rights only "*where possible*" (italics in original) improperly erases the clear line between water quality and water quantity Congress reconfirmed when it enacted § 510 in 1972 and § 101(g) in 1977.[18]

The contention of the United States (U.S. Br. 19 n.8) that §§ 101(g) and 510(2) have no bearing on this case misapprehends Tacoma's argument. Tacoma does not assert that there can be no practical relationship between water quantity and water quality. Rather, Congress has

[18] Section 101(g) was sponsored by Senator Wallop. He explained that it was intended to forestall recent proposals that would have effectuated "Federal purposes that were not strictly related to water quality. Those other purposes might include, but were not limited to Federal land use planning, plant siting and production planning purposes. This 'state's jurisdiction' amendment reaffirms that it is the policy of Congress that this Act is to be used for water *quality* purposes." 123 Cong. Rec. 39,211-39,212 (1977), reprinted in *A Legislative History of the Clean Water Act of 1977; A Continuation of the Legislative History of the Federal Water Pollution Control Act*, 95th Cong. 2d Sess. 531 (1978) (emphasis added). Senator Wallop's further statement that measures *incidentally* affecting the allocation of water quantities are permissible in the challenged § 401 certificate under the Act does not permit direct regulation of quantities.

drawn a legal distinction for the purposes of regulating water under the CWA. Other laws, particularly the FPA, authorize the direct regulation of streamflow quantities for fish habitat purposes.[19] The quality/quantity distinction applies here because, for purposes of the CWA, there is no difference between diversion of quantities for hydroelectric uses, and diversion for other proprietary purposes. Congress simply excluded the allocation of quantities from direct regulation under the CWA.[20]

IV. PROTECTED "USES" CANNOT BE APPLIED AS WATER QUALITY STANDARDS APART FROM "CRITERIA"

Notwithstanding the conjunction of uses and criteria in § 303(c)(2)(A), Washington and its amici insist that water quality standards can be implemented in a § 401 certificate on the basis of designated uses alone. The argument is inconsistent with the language of the statute. It also renders water quality standards unenforceably vague. Such standards must be comprehensible to entities which must comply with them, to officials who

[19] The quality/quantity distinction is expressly recognized in CWA § 102(b)(2): "The need for and the value of storage for regulation of streamflow (other than water quality) including but not limited to * * * fish and wildlife, shall be determined by the Corps of Engineers, Bureau of Reclamation, or other Federal agencies." Section 102(b)(6) draws the same distinction for hydroelectric projects licensed under the FPA.

[20] American Rivers (Am. Riv. Br. 18), but not the United States, appears to cite *Riverside Irrig. Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985) in support of the "indirect effects" argument. That case rejected a claim that a proposal to construct a dam and reservoir was entitled to a nationwide permit to discharge dredge and fill material under § 404 and 33 C.F.R. § 330.4. The court said that § 101(g) was mere preamble (*id.* at 513). The court held, however, that accommodation of the Act's policies limiting jurisdiction over water quantities and environmental concerns should be determined in an individual, not a nationwide permit proceeding. Thus the ultimate scope of the Corps' authority to regulate quantities for environmental purposes was remitted to decision in the individual permit proceeding. The proper scope of State authority under § 401 was not at issue.

enforce them, and to the permit writers whose role is central to the CWA's system for controlling discharges of pollutants. CWA § 301(a), 33 U.S.C. § 1311(a). "Uses" alone do not provide meaningful guidance because they typically cover such a broad range of salutary, but often conflicting societal goals. For example, Washington's characteristic uses include factors such as domestic, agricultural and industrial water supply; fish and shellfish rearing, spawning and harvesting; and "recreation (primary contact recreation, sport fishing, boating and aesthetic enjoyment)". Washington Administrative Code ("WAC"), 173-201-045(b) reproduced at Wash. Br. App. 8a. Water supply needs may conflict with recreational fishing; recreational fishing may conflict with industrial diversions. Yet all are water "uses" under § 303. Such uses, in and of themselves, cannot be meaningfully applied to prevent polluting discharges. That is why Congress said in § 303(c)(2)(A) that water quality standards "shall consist of designated uses * * * *and* the water quality criteria * * * based upon such uses." (emphasis added). The criteria provide comprehensible parameters to guide compliance and enforcement.[21] On the other hand, if § 401 discharge certificates can be granted, denied or conditioned solely on the basis of uses, then the States (or EPA) can impose any requirement related to the use of water by a federally licensed activity. Section 401 would become a federal licensing scheme for water use, rather than a limited delegation by which States can prevent polluting discharges.

Washington expressly concedes that the Elkhorn Project "will likely not violate any of Washington's water quality criteria" (Wash. Br. 24). The § 401 certification itself states that the prescribed flows are "in excess of

[21] Section 401(a)(3) refers directly to water quality criteria (see pp. 9-10 n.17). An express ground for a § 401(a)(3) determination is a change in "the water quality *criteria* applicable to such waters" (emphasis added). This provision permits States to modify their criteria if some new contaminant, not covered by criteria at the time a certification was issued, may be discharged when operations begin (see Am. Riv. Br. 21-22).

those required to maintain water quality in the bypass region" (Pet. App. 82a). These concessions explain Washington's insistence that broad ranging goals for the use of water should be an independent basis for determining compliance with its § 303 water quality standards in a § 401 certification. The distinction between designated uses and criteria, however, is not a technical formality invented by Tacoma. It is the product of Congress' careful revision of § 5(c) of the Water Quality Act of 1965 as reflected in the current language in § 303 (c)(2). Washington's suggestion that the criteria requirement can be evaded by simply transferring designated uses into the criteria section of water quality standards (Wash. Br. 24 n.29) ignores the use/criteria distinction in § 303(c)(2)(A).

The omission of specific pollutants from a State's water quality criteria would not allow the discharge of such pollutants into navigable waters, as Vermont, *et al.*, mistakenly contend (Vt. Br. 24-25). Under § 301(a), the discharge of any pollutant from a point source is prohibited unless expressly authorized by a permit under § 402, 33 U.S.C. § 1342, and in compliance with, *inter alia*, § 303 water quality standards. The term "pollutant" includes "biological materials" such as antibiotics. CWA § 502(6). The § 402 permit limitation Vermont describes was not necessary to *prohibit* discharge of antibiotic materials not expressly listed in Vermont's water quality criteria. It was fashioned to *permit* such a discharge into Lake Champlain.

Washington's antidegradation policy (WAC 173-201-035(8) (Wash. Br. 5a-7a)) is a part of Washington's water quality standards approved by the EPA. Neither EPA's regulation requiring an antidegradation policy (40 C.F.R. § 131.12) nor Washington's expression of that policy in WAC 173-201-035(8) elevates uses that are protected by the policy to the level of independent enforcement mechanisms. Section 303(d)(4)(B), as added into the CWA in 1987 (101 Stat. 69), and EPA's regulations (40 C.F.R. §§ 131.11 and 131.12) literally pro-

vide that existing uses are to be maintained, and degradation is to be prevented, through the promulgation, maintenance and application of appropriate criteria or equivalent scientifically ascertainable parameters. Without such requirements, the crucial role of criteria in water quality standards would be swallowed up by the generalities contained in the descriptions of designated uses. *Arkansas v. Oklahoma*, —— U.S. ——, 112 S. Ct. 1046, 1059-60 and n.16 (1992). Far from being a form of insurance (Wash. Br. 24), the antidegradation policy would become a blank check for State control of federally licensed activities that use water.

Respondents and amici, invoking *Chevron United States, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), urge the Court to defer to selected statements in various EPA manuals, handbooks, testimony and letters. The manuals and handbooks cited provide no authority for judicial construction of either § 303 or EPA's regulations. They are informal advice prepared within EPA's internal bureaus. Such materials often reach for regulatory results beyond EPA's jurisdictional grasp. For example, American Rivers cites (Am. Riv. Br. 23) EPA's *Questions and Answers On: Antidegradation* (1985) as supporting a total disallowance of any activity "which would partially or completely eliminate any existing use whether or not that use is designated in a State's water quality standards". This informal advice proposes a policy entirely outside of water quality standards under § 303(c)(2).[22] On the other hand, in its *Water Quality Standards Handbook*, EPA describes streamflows and dams as physical, non-water quality factors that may be limitations on "uses" for a water body. *Water Quality Standards Handbook*, p. 3-4 (Office of Water Regulations and Standards, EPA, 1983). The handbooks and manuals are not reasoned and authorita-

[22] The same deficiency is apparent in American Rivers Contention (Am. Riv. Br. 25) that Washington's base flow statute (RCW 90.54.020(3)(a)) could have been incorporated into the criteria according to an EPA handbook, *Wetlands and § 401 Certification.*

tive constructions entitled to *Chevron* deference. *Cf. John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, No. 92-1074, slip op. at 20-23 (Sup. Ct. December 13, 1993). Such materials are at best informal staff guidance. They are not subject to pre-issuance public scrutiny or to post-issuance judicial review, and they do not bind the agency itself in particular rulings.[23] *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38-40 (D.C. Cir. 1974). Deference recognized under *Chevron* should be reserved for definitive interpretations adopted in rulemakings, adjudications or other proceedings authorized by Congress. Administrative Conference of the U.S., *Recommendation 89-5*, 1 C.F.R. 305.89-5.[24]

Because of the increasingly intrusive and pervasive scope of environmental, health and safety regulation, *Chevron* deference should be confined to its intended function. *Chevron* is intended to permit policy choices to be made by politically answerable agencies within the scope

[23] Equally undeserving of *Chevron* deference are the statements of EPA's spokespersons cited by respondents and amici. The cited statements were issued in the ongoing bureaucratic dispute between FERC and EPA concerning appropriate jurisdiction over the use of water for hydropower licensing. They are advocacy pieces, not regulatory determinations. The cited statement of Deputy EPA Administrator Prothro reproduced by Vermont (Vt. Br. App. 10a-20a) was submitted to a Congressional subcommittee in the *1992 FERC Hearings, supra*, p. 3 n.3. The cited letter of Assistant EPA Administrator Wilcher was written in response to a letter of July 25, 1990 from the Director of FERC's Office of Hydropower Licensing which sought EPA's assistance in preventing States from abusing their § 401 authority in hydroelectric licensing procedures. *1992 FERC Hearings* at 232-234. Such statements are analogous to agency counsel's interpretations formulated during litigation, and like all such *post hoc* rationalizations, are entitled to no weight. See, *e.g., Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213 (1988). See also *Estate of Cowart v. Nicklos Drilling Co.*, —— U.S. ——, 112 S. Ct. 2589, 2594 (1992).

[24] See Robert A. Anthony, *Which Agency Interpretations Should Bind the Courts and the Public*, a report prepared for the Administrative Conference of the United States, April 13, 1989, (revised and republished, 7 Yale J. of Reg. 1 (Winter 1990)).

of a delegation from Congress, when Congress has indicated no intent with respect to such choices. In this case the issue is the proper scope of the delegation from Congress to the States and EPA in §§ 401 and 303. Congress' choices are clear from the language of those sections. Even if this were not so, the Court, in determining the proper scope of the delegation within which the choice will be made, should recognize that ambiguous language is not itself a delegation. *Cf. Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). Otherwise agencies (or States acting under agency guidance) might, as here, bootstrap themselves into areas where they lack jurisdiction. *Id.*

V. SECTION 401(d)'S REFERENCE TO "ANY OTHER APPROPRIATE REQUIREMENT OF STATE LAW" DOES NOT SUPPORT THE STREAMFLOW CONDITIONS REQUIRED

Washington (Wash. Br. 25-28), American Rivers (Am. Riv. Br. 25-26) and Vermont (Vt. Br. 28-29) claim that Washington's statute requiring base flows for perennial streams (RCW 90.54.020(3)(a)) is an "other appropriate requirement of State law" within the meaning of § 401(d) that provides an alternative basis for the streamflow quantities required in the § 401 certificate.[25] They seem to concede that the term "appropriate" in § 401(d) is a limitation. As noted above (pp. 1-2 and n.1), they have also repudiated one ground relied on below for the holding (Pet. App. 11a-13a) that § 401(d) is not limited to water quality standards and other limitations enumerated in § 401(a). The dispute between Tacoma and Washington, therefore, comes down to whether (without reliance on the repudiated ground) the "other appropriate requirement" clause incorporates any water-related State statute, or is limited to State laws that are appropriate to prevention of discharges that would pollute because of non-compliance with the water quality standards and limitations expressly enumerated in § 401(a).

[25] The United States does not reach this issue (U.S. Br. 17 n.6).

A State law giving advance notice of scientifically ascertainable parameters for controlling polluting discharges could be an "other appropriate" requirement of State law. The bare prescription, however, of a base flow requirement for fish habitat purposes under Washington's statute is not "appropriate". Section 401(d) shows that Congress intended State laws for controlling polluting discharges to be applied to specifically identified discharges in the same manner as the standards and limitations enumerated in § 401(a). They may be equivalent to or more stringent than such requirements. CWA § 510. In this case, the challenged conditions are not linked to any specific discharge that would have polluting effects inconsistent with State requirements analogous to § 303 criteria.

Washington's § 401(d) claim rests on its sweeping contention that "appropriate" in § 401(d) "simply means that the requirement must * * * relate to the activity in question and * * * be 'reasonably related' to the purposes and policies of the CWA" (Wash. Br. 27). Washington's emphasis on *activities* obliterates Congress' limitation of § 401 to the prevention of polluting discharges. It would substitute general goals (*i.e.*, preservation of fish habitat) for parameters equivalent to those contained in water quality criteria and other limitations. There would be no advance notice of what factors render a discharge unacceptable, except that the discharge must not be inconsistent with general and conflicting "uses". As recently held by the Court of Appeals of New York, such an "enlarged reading of 'appropriate requirement of state law' under subsection 401(d)" would countermand the limitations in § 401(a)(1) and would "contradict or undermine federal licensing by superimposing unrelated conditions not within the EPA mandates and specifications." *In Re Niagara Mohawk Power Corp. v. State Dep't of Envtl. Conservation*, 82 N.Y.2d 191, 1993 N.Y. LEXIS 3887, at *13-*14 (N.Y. Nov. 11, 1993).[26]

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[26] In *Niagara Mohawk* a utility sought a declaratory ruling concerning the scope of New York's certification authority under § 401 as applied to its hydroelectric facilities subject to FERC licensing and relicensing. The State conservation agency ruled that under CWA § 401 it could require compliance with *all* State laws "which bear on water quality", including, *inter alia*, laws governing fish and wildlife, wetlands, dam safety and construction, and New York's comprehensive environmental statute. The Court of Appeals of New York held that § 401 delegates only limited authority, based on requirements affecting water quality. It ruled: "Review by state agencies that would overlap or duplicate the federal purview and prerogatives was not contemplated and would infringe on and potentially conflict with an area of law dominated by the nationally uniform federal statutory scheme [in Part I of the FPA]." Lexis *6.

When Congress intends to grant conditioning authority over hydroelectric projects to agencies other than the FERC, it does so in clear and specific terms. See, *e.g.*, FPA §§ 4(e) and 10(j); 43 U.S.C. § 1761(a)(4); see also, *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984); CWA § 404(f)(2); *Monongahela Power Co. v. Marsh*, 809 F.2d 41 (1987). Absent such specificity, Part I of the FPA continues to apply with exclusive effect. *California v. FERC*, 495 U.S. 490 (1990); *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152 (1946). The proper approach is reflected in EPA's 1989 *Dam Water Quality Study*, conducted pursuant to § 524 of the Water Quality Act of 1987, *supra* pp. 7-8 n.13. That study recognized the need for a balancing of water quality objectives with other primary operational purposes of hydroelectric facilities.[27] That, of course, is the fundamental role of FERC under Part I of the FPA.

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[27] "Water quality impacts may be lessened by changes in the operational procedures of a dam. However, the majority of dams are not, and cannot be, operated solely for the purpose of achieving water quality objectives. Conflict of interest can occur if water quality objectives are added to the other primary operational purposes of the reservoir, such as flood control or power generation. The losses due to changes in operation for the primary uses would have to be compared to the benefits of protecting or enhancing stream uses." EPA, *Dam Water Quality Study. Report to Congress* at V-9 (NTIS Document PB93-167013, May 1989).

CONCLUSION

For the reasons stated in the Brief for Petitioners, the briefs of amici curiae supporting Petitioners, and this Reply Brief, the judgment of the Supreme Court of Washington should be reversed.

Respectfully submitted,

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